

IN THE UNITED STATES BANKRUPTCY COURT
FOR THE NORTHERN DISTRICT OF TEXAS
FORT WORTH DIVISION

U.S. BANKRUPTCY COURT
NORTHERN DISTRICT OF TEXAS
F.W.

IN RE:

GERALD DAVID SHARKEY,

Debtor.

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CASE NO. 03-46735-DML-7

THE DATE OF ENTRY IS
ON THE COURT'S DOCKET

MEMORANDUM ORDER

Before the court are (1) the Trustee's Objections to Asset Exemptions ("Trustee Objection") filed November 4, 2003, by Gerald David Sharkey's ("Debtor") chapter 7 trustee ("Trustee") and (2) the Objection to Debtor's Claimed Exemption ("Pluris Objection") filed November 5, 2003, by Pluris Capital LLC ("Pluris") (collectively, "Objections"). Debtor's responses to the Objections were filed on November 20, 2003. The court heard argument and evidence concerning the Objections on May 24, 2004. The court thereafter afforded the parties an opportunity to provide authorities in support of their respective positions.

I. BACKGROUND

The gist of the Objections is that Debtor has improperly sought to exempt as his homestead, under the Texas constitution and statutory law,¹ approximately twenty acres and buildings thereon located in Weatherford, Texas (the "Property"). The Objections assert that Debtor has abandoned the Property and that the Property has therefore lost its homestead character. Alternatively, the Trustee Objection asserts that the Property is actually two

¹ See 11 U.S.C. § 522(b)(2) (2004) (setting out exemptions applicable in bankruptcy); TEX. CONST. art. XVI, § 50 (protecting the homestead of a family from forced sale for the payment of all debts not otherwise excepted by section 50); TEX. PROP. CODE ANN. § 41.001(a) (2004) ("A homestead . . . [is] exempt from seizure for the claims of creditors except for encumbrances properly fixed on homestead property.").

contiguous tracts, one of which the Debtor has leased to a third party, and cannot properly be claimed as exempt homestead property.²

Debtor argues he never intended to abandon the Property and did not do so. Debtor also notes the two tracts are contiguous and the debt secured by the Property would exhaust any value attributable to any part of the Property that is not exempt.

II. DISCUSSION

Turning first to the abandonment issue, the parties do not dispute that Debtor established the Property as his homestead.³ The evidence showed, however, that Debtor, after purchasing and living on the Property for a time, moved to a residence in North Richland Hills, which he and his family occupied under a lease-purchase arrangement. Thereafter, Debtor moved to an apartment in Boston, Massachusetts, to take a new job. Since that time, Debtor has moved back to Texas and presently resides with his wife in the metal building on the Property, but Debtor continues to work out of state. Debtor has also unsuccessfully tried to sell the Property. Debtor testified, however, that he never intended to abandon the Property.

To show that Debtor has abandoned the Property as his homestead,⁴ the Trustee and Pluris point to Debtor's attempts to sell the Property, Debtor's various relocations, and the fact

² The Trustee Objection also objects to exemption of certain personalty. The court understands any dispute respecting the personalty has been resolved.

³ There is a house on one tract and a metal building on the other, and Debtor initially occupied the house. Debtor had purchased both tracts as a unit in a single transaction.

⁴ The burden of proof on exemption issues is assigned to the objecting party. See FED. R. BANKR. P. 4003(c); *Perry v. Dearing (In re Perry)*, 45 F.3d 303, 311 (5th Cir. 2003); *Rubarts v. First Gibraltar Bank, FSB (In re Rubarts)*, 896 F.2d 107, 110 (5th Cir. 1990).

that Debtor has rented a small portion of the Property for commercial use, as well as the fact that Debtor is currently renting the house on the Property to a third party.⁵

In Texas, it is well settled that once property is established as a homestead, the ability of the owner to exempt the property “may be lost only through death, alienation, or abandonment.” *See In re Perry*, 345 F.3d at 310 (citations omitted). *See also Resolution Trust Corp. v. Olivarez*, 29 F.3d 201, 206-07 (5th Cir. 1994) (same); *Bradley v. Pac. Southwest Bank, FSB (In re Bradley)*, 960 F.2d 502, 507 n.8 (5th Cir. 1992) (same). As Debtor has not divested himself of ownership, Debtor can only have lost the right to exempt the Property through abandonment.

In order to have abandoned his homestead rights, Debtor must have ceased using the Property for homestead purposes *and* intended to abandon it. *See Olivarez*, 29 F.3d at 207 (noting that “[a]bandonment of a homestead requires both the cessation or discontinuance of use of the property as a homestead coupled with the intent to permanently abandon the homestead”). That Debtor moved from the Property does not alone constitute abandonment absent “the intent to permanently abandon the homestead.” *Id.* *See also In re Anderson*, 240 B.R. 254, 258 (Bankr. W.D. Tex. 1999) (finding that physical absence alone does not defeat a homestead claim; rather, abandonment depends upon the debtor’s intent not to return); *In re Leonard*, 194 B.R. 807, 809-11 (Bankr. N.D. Tex. 1996) (determining that “[a] residence and a homestead may be two different properties” and that removal from the property with definite intention not to return and use and occupy the property as a homestead is the controlling fact).

⁵ This final argument was not raised in the Objections; rather, the Trustee and Pluris raised this point at the May 20, 2004, hearing.

In *In re Leonard*, a case parallel to the instant matter, this court (per Akard, J.) held that abandonment did not occur merely because debtors left the homestead. *In re Leonard*, 194 B.R. at 811 (“Even the temporary occupancy of other property . . . which might therefore be claimed as homestead, does not constitute an abandonment of the homestead formerly occupied as such when no intention to abandon exists.”) (citation omitted). In *In re Leonard*, testimony of intent to return, listing of the property as a homestead on schedules, and other ties to the property disproved an intention to abandon. *Id.* at 810-12.

Nor does this court conclude that Debtor’s attempts to sell the Property deprive the Property of its homestead character. See *In re Bradley*, 960 F.2d at 509 (“*Unsuccessful* attempts to sell or develop property do not ‘deprive it of its homestead character.’”) (emphasis in original). See also *In re Baker*, 307 B.R. 860, 864 (Bankr. N.D. Tex. 2003) (concluding that “an intention or attempt to sell a homestead does not amount to an abandonment as long as the homestead claimants retain possession and have no intent to abandon *unless the sale materializes*”) (emphasis in original) (internal quotations omitted); *Sullivan v. Barnett*, 471 S.W.2d 39, 43 (Tex. 1971) (“An intention or attempt to sell a homestead does not amount to an abandonment as long as the homestead claimants retain possession and have no intent to abandon unless the sale materializes.”); *West v. Austin Nat’l Bank*, 427 S.W.2d 906, 912 (Tex. Civ. App.—San Antonio 1968, writ ref’d n.r.e.) (“[T]he continued listing of the ranch for sale is no evidence of the formation of a new intention to abandon the homestead.”); *West Tex. State Bank of Snyder, Tex. v. Helms*, 326 S.W.2d 47, 49 (Tex. Civ. App.—Eastland 1959, no writ) (holding that “an offer to sell or even an executory contract to sell a homestead does not as a matter of law deprive it of its homestead character. On the contrary it is held that a homestead conveyed by the owners

continues to be such unless it is voluntarily abandoned before the deed is executed or the owners have acquired another homestead.”) (internal citations omitted). The court finds this reasoning wholly consistent with Texas statutory provisions which exempt proceeds from the sale of a homestead for six months following the sale of a property. *See* TEX. PROP. CODE ANN. § 41.001(c) (“The homestead claimant’s proceeds of a sale of a homestead are not subject to seizure for a creditor’s claim for six months after the date of sale.”).

The Trustee and Pluris also argue that (1) a portion of the two tracts that form the Property should be deemed nonexempt because Debtor rented a small piece of the Property for commercial use; or, alternatively, (2) because Debtor is currently renting the house located on the Property to a third party, the Property no longer retains its homestead status. The court disagrees.

Based on constitutional and statutory provisions, Texas has consistently provided that the “[t]emporary renting of the homestead does not change its homestead character if the homestead claimant has not acquired another homestead.” *In re Leonard*, 194 B.R. at 810. *See also* TEX. CONST. art. 16 § 51 (providing “that any temporary renting of the homestead shall not change the character of the same, when no other homestead has been acquired”); TEX. PROP. CODE ANN. § 41.003 (“Temporary renting of a homestead does not change its homestead character if the homestead claimant has not acquired another homestead.”); *In re Anderson*, 240 B.R. at 259 (“The temporary leasing of a homestead to a third party also does not compel a finding of abandonment.”).

The court notes that it has long been established in this circuit that “[e]ven if some of the uses to which . . . the homestead had been put were not homestead uses, such uses would not constitute abandonment of the part so used, in the absence of an intention not to use them again

for homestead purposes.” *Dunn v. Eckhardt (In re C. Eckhardt & Sons)*, 256 F. 315, 319 (5th Cir. 1919). More recently, the Fifth Circuit again confirmed that renting property does not always equate to abandonment for purposes of the homestead laws and concluded that “[n]either the Texas Property Code, nor the Texas Constitution, bar[s] a rural resident from operating a business, *per se*, on the property on which he resides” and “we cannot agree that the operation of a business, without more, necessarily forfeits a rural homestead interest.” *In re Perry*, 345 F.3d at 318-19. Although Debtor rented a small portion of the Property to a third-party commercial enterprise and is currently renting the house on the Property to a third party, Debtor testified that he intended to use the Property again for homestead purposes, did not intend to abandon the Property, and is, in fact, currently residing in the metal building on the Property with his wife. Accordingly, the court is persuaded that Debtor’s rentals of the Property constitute insufficient reason to forfeit Debtor’s homestead interest.⁶

In Debtor’s case, the parties acknowledge that Debtor has not acquired another homestead. Indeed, Debtor *has returned* to the Property and now resides there with his wife. The record also shows that Debtor currently grows coastal hay and maintains a pecan orchard on the Property. Debtor’s move to North Richland Hills was to access schools (a situation similar to *In re Leonard*), and Debtor’s testimony and schedules are inconsistent with an intent to abandon.

⁶ Notwithstanding Debtor’s willingness to cede the exempt homestead status of the small portion of the Property rented for commercial purposes (while noting that the value of the rented commercial portion of the Property is far less than the debt against the Property), the court notes that it is well established that “Texas law does not favor the severance of a single contiguous tract of land into homestead and non-homestead sections.” *In re Bradley*, 960 F.2d at 508-09. *See also Youngblood v. Youngblood*, 76 S.W.2d 759, 760 (Tex. 1934) (“[C]ontiguity of lots or parcels of land presents a situation decidedly favorable for extending the outside boundaries of the homestead limits . . .”). Absent abandonment, and consistent with Debtor’s residence on the Property and the court’s reasoning herein, the court believes severance from the homestead of that small portion of the Property rented as commercial space would be inappropriate.

See McFarland v. Rousseau, 667 S.W.2d 929, 931 (Tex. App.—Corpus Christi 1984, no writ) (“Neither temporary absence from a homestead or even temporarily removing to another State alone constitutes abandonment.”).

Because homesteads are “favorites of the law,” the court “must give a liberal construction to the constitutional and statutory provisions that protect homestead exemptions.” *In re Bradley*, 960 F.2d at 507. *See also In re Perry*, 345 F.3d at 316 (same). “Indeed, we [the Fifth Circuit] must uphold and enforce the Texas homestead laws even though in so doing we might unwittingly ‘assist a dishonest debtor in wrongfully defeating his creditor.’” *In re Bradley*, 960 F.2d at 507. Here, the Trustee and Pluris have offered no evidence beyond Debtor’s moves and rental of the Property to show abandonment.⁷ Moreover, Debtor testified that he had always intended to return to the Property as his homestead. Consequently, the Trustee and Pluris have not carried their burden of proof to show that Debtor abandoned the Property. Therefore, as to abandonment, the Objections must be overruled.

The court next addresses whether the Property is considered “urban” homestead or “rural” homestead under Texas law. The Texas Property Code, “Definition of Homestead,” provides:

- (a) If used for the purposes of an urban home or as both an urban home and a place to exercise a calling or business, the homestead of a family or a single, adult person, not otherwise entitled to a homestead, shall consist of not more than 10 acres of land which may be in one or more contiguous lots, together with any improvements thereon.
- (b) If used for the purposes of a rural home, the homestead shall consist of:
 - (1) for a family, not more than 200 acres, which may be in one or more parcels, with the improvements thereon; or

⁷ *See, e.g., TEX. PROP. CODE* § 41.004 (“If a homestead claimant is married, a homestead cannot be abandoned without the consent of the claimant’s spouse.”).

- (2) for a single, adult person not otherwise entitled to a homestead, not more than 100 acres, which may be in one or more parcels, with the improvements thereon.
- (c) A homestead is considered to be urban if, at the time the designation is made, the property is:
 - (1) located within the limits of a municipality or its extraterritorial jurisdiction or a platted subdivision; and
 - (2) served by police protection, paid or volunteer fire protection, and at least three of the following services provided by a municipality or under contract to a municipality:
 - (A) electric;
 - (B) natural gas;
 - (C) sewer;
 - (D) storm sewer; and
 - (E) water.
- (d) The definition of a homestead as provided in this section applies to all homesteads in this state whenever created.

TEX. PROP. CODE ANN. § 41.002 (2004).

To determine the homestead character of Debtor's Property, the court need only consider the conjunctive requirements of section 41.002(c)(2). Although the record shows that Debtor's Property is served by the Parker County Sheriff's Department and a volunteer fire department, Debtor does not receive services provided by a municipality or under contract to a municipality for electric, natural gas, sewer, storm sewer, or water. Thus, it is clear that the Property cannot be an "urban" homestead. Moreover, it is uncontroverted that Debtor grows coastal hay and pecan trees on the Property. *See In re Bradley*, 960 F.2d at 508 (noting under prior law that Texas courts have routinely held that use of property for farming or ranching purposes, *e.g.*, grazing of cattle and cultivation of crops, is sufficient to establish a property's rural homestead

character). Accordingly, the court finds that Debtor's designation of the entire Property as rural homestead is proper under section 41.002 of the Texas Property Code.

III. CONCLUSION

The court concludes that (1) the Property is a family rural homestead; (2) Debtor did not abandon the Property; (3) the Property did not lose its family rural homestead character because Debtor attempted to sell the Property, rented a small portion thereof for commercial use, or rented the house on the Property to a third party; and (4) the entire Property shall be exempt.

Therefore, **IT IS HEREBY ORDERED** that the Objections should be, and hereby are, **OVERRULED**.

SO ORDERED this 12th day of August 2004.



DENNIS MICHAEL LYNN
UNITED STATES BANKRUPTCY JUDGE